OXBRIDGE HEIGHT SDN BHD v. ABDUL RAZAK MOHD YUSOF & ANOR

COURT OF APPEAL, PUTRAJAYA
ZAHARAH IBRAHIM JCA
MOHAMAD ARIFF YUSOF JCA
DAVID WONG DAK WAH JCA
[CIVIL APPEAL NO: J-02(NCVC)(W)-2725-12-2013]
1 DECEMBER 2014

CONTRACT: *Agreement – Settlement agreement – Purchaser waived liquidated and ascertained damages ('LAD') for late delivery of property under settlement agreement – Whether developer delivered vacant possession within extended time – Whether purchaser could claim based on original LAD provision – Whether purchaser's claim for LAD amounted to breach of settlement agreement – Whether fraud established – Contracts Act 1950, s. 64*

The appellant was a housing developer for a project described as Jaya Putra Perdana ('the project') and the respondents were the purchasers of a double-storey terrace house in the said project. The parties entered into a sale and purchase agreement ('SPA') dated 17 April 2006 where the provision on liquidated and ascertained damages ('LAD') for late delivery was included. Clause 23 of the SPA required vacant possession of the building to be delivered to the purchaser within 24 calendar months from the date of the SPA, failing which the appellant was liable to pay liquidated damages to the purchaser. However, around December 2006 until early 2007, as a result of flooding, the project stalled and suffered financial difficulties. The project was classified by the 'Bahagian Pemantauan Perumahan Swasta, Jabatan Perumahan Negara' ('JPN') as a 'project lewat' and 'projek sakit'. It was acknowledged by JPN that the project suffered delays since the developer faced a *force majeure* problem. As a result of the involvement and assistance of JPN and due to the appellant's acknowledgement that it was not able to complete the development within the time frame under the SPA, the parties entered into a settlement agreement dated 10 October 2011. *Vide* the settlement agreement, it was agreed that (i) the new date of completion was 14 August 2011 or 12 months from the signing of the agreement, whichever was later; (ii) the purchaser waived the LAD for late delivery which the appellant was liable to pay under cl. 23 of the SPA until the new date of completion; (iii) the purchaser shall not take any legal action to recover the LAD; and (iv) in the event vacant possession was not delivered on the new date of completion, the purchaser would be at liberty to make a claim for the LAD as if the extension of time was not granted. On 9 January 2012, the appellant delivered vacant possession of the property to the respondents, *ie*, 12 months from the date of the settlement agreement. The respondents, however, brought a claim before the Tribunal for Homebuyer Claims and was awarded a sum of RM50,000 as damages for the late delivery of vacant possession. Dissatisfied, the appellant filed a suit in the High Court based on

the tort of deceit and for breach of the settlement agreement. The appellant also claimed for, *inter alia*, fraudulent misrepresentation. It was contended that (a) the respondents induced the appellant to enter into the settlement agreement to complete the construction of the property and to deliver vacant possession of the property to the respondents; and (b) several other purchasers were led to cancel their purchase after the respondents filed their claim with the tribunal. As a result, the appellant alleged that it suffered loss and damages. Dismissing the appellant's claim, the High Court ruled, *inter alia*, that the settlement agreement was invalid since it contravened the Housing Development (Control and Licensing) Act 1966 and the SPA remained valid. Hence, this appeal.

Held (allowing appeal in part)
Per Mohamad Ariff Yusof JCA delivering the judgment of the court:

(1) The respondents had expressly agreed to waive the LAD claimable under the SPA. The High Court Judge erred in his assessment of the evidence and failed to address the course of negotiations and meetings between the developer, the house buyers and JPN in the context of the development being a 'projek sakit' which was delayed by *force majeure*. The developer made it plain that it could not continue with the project unless the LAD claims were waived in view of its financial difficulties resulting from the *force majeure*. (para 23)

(2) *Vide* the settlement agreement, the larger majority of the house buyers, including the respondents, agreed to a waiver, had their houses completed and delivered by the appellant within the new completion date. Despite agreeing to the waiver, the respondents still proceeded to file a claim with the tribunal and obtained the award in their favour where the LAD was calculated from the initial period of delay under the SPA. The action constituted a clear breach of the settlement agreement. (para 23)

(3) The signing of the settlement agreement would fall within the terms of s. 64 of the Contracts Act 1950 ('CA') which deals with the dispensation of a promise made to a promisee. Further, JPN was brought into the picture and kept fully appraised of the status of the housing project and the proposal of a settlement agreement to move the development forward to completion with a new completion date and a new date for calculating the LAD. The property was completed and delivered to the respondents within the extended time. (paras 24 & 30)

(4) In the event vacant possession was not delivered by the new completion date, the respondents would have been at liberty to sue on the basis of the original LAD provision. It was not a situation where the purpose of the housing legislation being to protect the weak against the strong was ousted. In terms of policy, there should be nothing illegal in law for a

settlement agreement to be negotiated with the full participation and direction from JPN. It was done with a view to save a failing housing project from being an abandoned project. Further, it would be in the public interest and in the interest of house buyers if the law allowed a regulated settlement and waiver of the LAD on terms as specified in the settlement agreement. As such, it was not right and proper for the respondents, despite their promise to conditionally waive the LAD under the SPA, to resile from their promise and sue for late delivery under the SPA as if the settlement agreement did not exist. (para 30)

(5) The burden of proof for deceit/fraud is high. Proof of fraud has to be on the standard of proof beyond reasonable doubt. On the facts, the appellant had not established its claim for deceit and fraudulent misrepresentation and there was no basis for the extravagant claims for loss of profits and loss of reputation to be allowed. The appellant did not discharge its burden of proof on this high standard. As such, the appeal was allowed in part on the basis that there was a breach of the terms of the settlement agreement. (paras 31 & 32)

Bahasa Malaysia *Translation Of Headnotes*

Perayu adalah pemaju perumahan bagi projek yang dikenali sebagai Jaya Putra Perdana ('projek') dan responden-responden merupakan pembeli rumah teres dua tingkat dalam projek tersebut. Pihak-pihak telah memasuki satu perjanjian jual beli ('PJB') bertarikh 17 April 2006 di mana peruntukan ganti rugi tertentu dan ditetapkan ('LAD') bagi kelewatan penyerahan telah dimaktubkan. Klausa 23 PJB memperuntukkan bahawa milikan kosong hartanah perlu diserahkan kepada pembeli dalam masa 24 bulan dari tarikh PJB dan jika gagal berbuat demikian, perayu bertanggungjawab untuk membayar ganti rugi tertentu kepada pembeli. Walau bagaimanapun, sekitar bulan Disember 2006 sehingga awal 2007, disebabkan oleh banjir, projek tersebut terpaksa dihentikan dan telah mengalami masalah kewangan. Bahagian Pemantauan Perumahan Swasta, Jabatan Perumahan Negara ('JPN') mengklasifikasikan projek tersebut sebagai 'projek lewat' dan 'projek sakit'. JPN juga mengakui bahawa projek tersebut telah mengalami kelewatan memandangkan pemaju menghadapi masalah *force majeure*. Akibat penglibatan dan bantuan JPN dan disebabkan oleh pengakuan perayu bahawa pembinaan tidak dapat diselesaikan dalam masa yang ditetapkan di bawah PJB, pihak-pihak telah memasuki satu perjanjian penyelesaian bertarikh 10 Oktober 2011. Melalui perjanjian tersebut, adalah dipersetujui bahawa (i) tarikh baru penyiapan adalah 14 Ogos 2011 atau 12 bulan dari perjanjian itu ditandatangani, mana-mana adalah terkemudian; (ii) pembeli mengetepikan LAD bagi kelewatan penyerahan di bawah kl. 23 PJB sehingga tarikh baru penyiapan; (iii) pembeli tidak mengambil sebarang tindakan undang-undang untuk menuntut LAD; dan (iv) jika milikan kosong tidak diserahkan pada tarikh baru penyiapan, pembeli boleh membuat tuntutan LAD seandainya lanjutan masa tidak diberikan. Pada 9 Januari 2012, perayu

memberikan milikan kosong kepada responden-responden, iaitu, 12 bulan dari tarikh perjanjian penyelesaian. Responden-responden, walau bagaimanapun, membuat tuntutan di Tribunal Tuntutan Pembeli Rumah dan diawardkan jumlah RM50,000 sebagai ganti rugi kelewatan penyerahan milikan kosong. Tidak berpuas hati, perayu memfailkan tindakan di Mahkamah Tinggi berdasarkan tort penipuan dan kemungkiran perjanjian penyelesaian. Perayu juga menuntut untuk, antara lain, misrepresentasi palsu. Adalah dihujahkan bahawa (a) responden telah mendorong perayu untuk memasuki perjanjian penyelesaian bagi menyelesaikan pembinaan dan memberi milikan kosong kepada responden-responden; dan (b) beberapa pembeli lain telah membatalkan pembelian mereka selepas responden-responden memfailkan tuntutan dengan tribunal. Oleh itu, perayu berhujah bahawa ia telah mengalami kerugian. Menolak tuntutan perayu, Mahkamah Tinggi memutuskan, antara lain, bahawa perjanjian penyelesaian adalah tidak sah memandangkan ia melanggar Akta Pemajuan Perumahan (Kawalan dan Pelesenan) 1966 dan PJB masih sah. Oleh itu, rayuan ini.

Memutuskan (membenarkan sebahagian rayuan)

Oleh Mohamad Ariff Yusof HMR menyampaikan penghakiman mahkamah:

(1) Responden-responden telah bersetuju untuk mengetepikan LAD yang boleh dituntut di bawah PJB. Hakim Mahkamah Tinggi telah terkhilaf dalam menilai keterangan dan gagal mempertimbangkan rundingan dan mesyuarat di antara pemaju, pembeli rumah dan JPN dalam konteks bahawa pembinaan tersebut adalah suatu 'projek sakit' yang ditangguhkan oleh *force majeure*. Pemaju telah menjelaskan bahawa projek tersebut tidak dapat diteruskan kecuali jika tuntutan LAD diketepikan memandangkan masalah kewangannya yang berpunca daripada *force majeure*.

(2) Melalui perjanjian penyelesaian, majoriti besar pembeli rumah, termasuk responden-responden, bersetuju untuk suatu penepian, asalkan rumah mereka disiapkan dan diberikan oleh perayu dalam tempoh masa tarikh baru penyiapan. Walaupun persetujuan diberikan untuk penepian, responden-responden masih memfailkan tuntutan dengan tribunal dan memperolehi award yang memihak kepada mereka dan LAD dikira dari tempoh kelewatan asal di bawah PJB. Tindakan ini menunjukkan suatu perlanggaran perjanjian penyelesaian.

(3) Penandatanganan perjanjian penyelesaian terangkum di bawah s. 64 Akta Kontrak 1950 ('AK') berhubung dengan dispensasi janji yang dibuat kepada penerima janji. Tambahan, JPN dimaklumkan mengenai status projek perumahan dengan tarikh baru penyiapan dan pengiraan LAD. Hartanah telahpun disiapkan dan diserahkan kepada responden-responden dalam jangka masa yang telah dilanjutkan.

(4) Jika milikan kosong tidak diserahkan sehingga tarikh penyiapan baru, responden-responden mempunyai hak untuk mengambil tindakan menuntut peruntukan asal LAD. Tidak timbul keadaan di mana tujuan undang-undang perumahan adalah untuk memberi perlindungan kepada yang lemah terhadap yang kuat disingkirkan. Dari segi polisi, tiada apa-apa yang menyalahi undang-undang bagi perjanjian penyelesaian dirunding dengan kehadiran dan arahan JPN. Ia dilakukan dengan niat untuk menyelamatkan projek perumahan daripada menjadi projek terbengkalai. Tambahan, adalah demi kepentingan awam dan kepentingan pembeli rumah jika undang-undang membenarkan suatu penyelesaian berperaturan dan penepian LAD berdasarkan terma-terma perjanjian penyelesaian. Oleh itu, responden-responden tidak sepatutnya, setelah berjanji untuk mengetepikan LAD dengan syarat di bawah PJB, memungkiri perjanjian tersebut dan mengambil tindakan bagi penyerahan lewat di bawah PJB seakan-akan perjanjian penyelesaian tidak wujud.

(5) Beban pembuktian penipuan/frod adalah tinggi. Bukti frod adalah berdasarkan standard pembuktian melampaui keraguan munasabah. Berdasarkan fakta, perayu tidak membuktikan tuntutannya untuk penipuan dan misrepresentasi palsu dan tiada asas untuk membenarkan tuntutan yang melampaui batas bagi kehilangan keuntungan dan kehilangan reputasi. Perayu tidak melepaskan beban pembuktiannya berdasarkan standard tinggi ini. Oleh itu, sebahagian rayuan dibenarkan atas dasar bahawa terdapatnya kemungkiran terma-terma perjanjian penyelesaian.

Case(s) referred to:

Asean Security Paper Mills Sdn Bhd v. CGU Insurance Bhd [2007] 2 CLJ 1 FC ***(refd)***

MK Retnam Holdings Sdn Bhd v. Bhagat Singh Surian Singh [1985] 1 CLJ 520; [1985] CLJ (Rep) 199 SC ***(refd)***

Saminathan v. Pappa [1980] 1 LNS 174 PC ***(refd)***

Sentul Raya Sdn Bhd v. Hariram Jayaram & Ors and Other Appeals [2008] 4 CLJ 618 CA ***(refd)***

Yong Tim v. Hoo Kok Chong & Anor [2005] 3 CLJ 229 FC ***(refd)***

Legislation referred to:

Contracts Act 1950, ss. 24, 56(3), 64

Housing Development (Control and Licensing) Regulations 1989, reg. 11(1)

For the appellant - B Thangaraj (Tan Vincent & R Archana with him); M/s Tan Vincent & Azmi

For the respondents - K Bharathi; M/s Kamarudin Yusof & Assocs

[Appeal from High Court, Johor Bahru; Suit No: 22NCVC-455-11-2012]

Reported by Kumitha Abd Majid

A

JUDGMENT

Mohamad Ariff Yusof JCA:

The Parties

B **[1]** The appellant in this appeal, Oxbridge Height Sdn Bhd, was a housing developer for a project described as Jaya Putra Perdana which comprised part of a larger project described as Bandar Jaya Putra. The respondents were purchasers of a double-storey terrace house in Phase B of Jaya Putra Perdana. The appellant was the vendor of the property.

C **[2]** The appellant/plaintiff had sued the respondents/defendants in the High Court below for the tort of deceit, fraudulent misrepresentation and breach of a settlement agreement entered into between them. The High Court dismissed the appellant's claim with costs.

Our Decision In The Appeal

D **[3]** We allowed the appellant's appeal before us in part with an order that parties were to bear their own costs. The claim for breach of the settlement agreement was allowed with damages of RM50,000 to be paid by the respondents to the appellant together with judgment interest from the date of our order until full payment.

E

Background Facts

[4] In the sale and purchase agreement ("SPA") executed between the parties dated 17 April 2006, which followed the standard agreement under Schedule G of reg. 11(1) of the Housing Development (Control and F Licensing) Regulations 1989 ("the Regulations"), the usual provision on liquidated and ascertained damages ("LAD") for late delivery was included. Clause 23 of the SPA required vacant possession of the building to be delivered to the purchaser within 24 calendar months from the date of the SPA, failing which the vendor (the developer) was liable to pay to the purchaser liquidated damages "calculated from day-to-day at the rate of 10% G per annum of the purchase price from the expiry date of the delivery of vacant possession ... until the date the purchaser takes vacant possession of the same building".

[5] The project stalled. According to the plaintiff, as the developer, the project suffered financial difficulties as a result of flooding (*force majeure*) from H around December 2006 until early 2007. The project was classified by Bahagian Pemantauan Perumahan Swasta, Jabatan Perumahan Negara, Kementerian Perumahan dan Kerajaan Tempatan ("JPN") as a "projek lewat" and "projek sakit". In the report produced by JPN, it was acknowledged that the project suffered delays because the developer faced a I *force majeure* problem.

[6] The parties then entered into a settlement agreement formally dated as 10 October 2011. This important agreement was tendered in court as exh. P18 (appearing on pp. 464 to 476 of the appeal record, Parts B & C). The immediate parties to the settlement agreement were the appellant as vendor and several parties described as "the purchaser" as set out in Schedule 2 of the said agreement. There were altogether 41 purchasers included in Schedule 2, with the present respondents listed as purchaser No. 11. It was also clear from Schedule 2 that the properties concerned Phase 3B of the project. According to the appellant, the first respondent acted as the representative of purchasers of Phase 3B.

[7] It appeared on the evidence that the signing of the settlement agreement was the result of the involvement and assistance of JPN and a series of meetings held between the parties. According to the appellant, JPN acted as a facilitator and mediator between the developer and the purchasers.

[8] Counsel for the appellant referred the court to the relevant reports and minutes of meetings prepared by JPN which appeared on pp. 385 to 409 of the appeal record, vol. 2(3). It was in evidence that the first respondent attended the meetings as a representative for the purchasers of Phase 3B. The background leading to the signing of the settlement agreement could be gleaned from the contents of an e-mail letter from Pengarah, Bahagian Pemantauan Perumahan Swasta (exh. P2), appearing on pp. 391 to 392 of the same volume of the appeal record. To quote salient parts of the e-mail letter:

> Mesyuarat Projek Perumahan Bermasalah Oxbridge Height Sdn Bhd dan Hartaplus Sdn Bhd di Majlis Perbandaran Johor Bahru pada 11 Jun 2010 yang telah dipengerusikan oleh Y. Bhg. Dato' Zainudin bin Tala, Timbalan Ketua Pengarah (Operasi), Jabatan Perumahan Negara adalah dirujuk. Mesyuarat tersebut telah dijalankan dengan dua sesi, iaitu:
>
> (i) Sesi 1: Perbincangan pihak JPN bersama pihak pembeli, dan
>
> (ii) Sesi 2: Perbincangan antara JPN, MPJB, pihak pemaju dan pembeli-pembeli rumah.
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> Pada mesyuarat tersebut telah dimaklum dan dibincang dengan jelas tentang perkara-perkara di bawah:
>
> (i) Status projek yang telah mengalami kelewatan yang ketara dan perkembangan kemajuan amat perlahan kesan dari kekangan kewangan pihak pemaju.
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> (ii) Pemaju masih ingin menyiapkan projek namun bimbang akan tuntutan LAD yang tinggi dari pembeli-pembeli.
>
> (iii) JPN memaklumkan implikasi yang akan dihadapi jika projek tersebut diisytihar sebagai projek terbengkalai atau tindakan Mahkamah di ambil seperti berikut:
>
> · Penamatan lesen pemaju dan pelantikan mana-mana pemaju baru untuk mengambil alih projek ini akan menimbulkan implikasi perundangan terhadap pihak berkepentingan khususnya pembeli-pembeli rumah;

A · Mana-mana "secured main creditors" pemaju akan mengambil peluang untuk menggulungkan syarikat tersebut bagi tujuan mengutip hutang pinjaman mereka;

· Risiko kerugian dari segi kewangan dan peluang memiliki rumah yang dihadapi oleh pembeli rumah adalah lebih tinggi sekiranya syarikat ini digulung; dan

B

· Secara amnya, tempoh penyiapan dan penyerahan rumah akan menjadi lebih panjang dan ini juga akan meningkatkan beban tanggungan kos oleh pembeli-pembeli rumah.

(iv) Hasil daripada mesyuarat tersebut, satu pendekatan penyelesaian telah dicadangkan iaitu:

C

· Pembeli bersetuju supaya tuntutan LAD adalah mengikut tarikh siap baru untuk projek ini berdasarkan "settlement agreement" yang akan ditetapkan; dan

· Tempoh penyiapan yang baru di dalam "settlement agreement" tersebut hendaklah berpatutan/munasabah ...

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[9] On the evidence, it was apparent that JPN was part and parcel of the negotiating process, and the proposed settlement agreement was extensively discussed between the parties. It was clearly proposed that the LAD was to be calculated from a new date of completion.

E

The Terms Of The Settlement Agreement

[10] The settlement agreement was executed and formally dated, as stated earlier, as 11 October 2011, with the following principal terms:

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(a) The vendor (appellant) acknowledging that it was not able to complete the development within the time frame under the SPA "for reasons beyond the control of the vendor", had requested for time to complete and had requested the purchaser to waive the LAD for late delivery which the vendor was liable to pay under cl. 23 until the "New Completion Date" (Recital 1.4);

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(b) The purchaser had agreed to the request "subject to the terms and conditions of [the] settlement agreement" (Recital 1.4);

(c) The purchaser confirmed having obtained independent legal advice on the settlement agreement (Recital 1.5);

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(d) In consideration of the vendor paying to the purchaser the sum of RM1 as the agreed "settlement amount", and in consideration of the mutual promises between the parties contained in the agreement "in full and final settlement of the all of the purchaser's claims for LAD" for the delay in delivering vacant possession, the purchaser granted to the vendor an extension of time until "the New Completion Date" to complete the property and deliver vacant possession to the purchaser "in

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the manner provided for in the principal agreement and shall not take any legal action to recover the LAD or to set-off the LAD against the outstanding purchase price for the property." (cl. 2.1)

(e) The "New Completion Date" was defined in s. 7 of Schedule to the settlement agreement as 14 August 2011 or 12 months from the signing of the settlement agreement, whichever was later.

(f) The vendor waived all late interest charges to date and gave 21 days from the date of the agreement for the purchaser to settle any outstanding amounts of instalments due on the purchase price for which progressive payments notices had been sent, and agreed to charge late payment interest on these sums only for the period after this 21 days if the outstanding amounts were not paid. (cl. 2.3)

(g) The vendor promised to expeditiously proceed with the development works and deliver vacant possession on the new completion date in the manner specified in the principal agreement, ie, the SPA. (cl. 2.4)

(h) In the event vacant possession was not delivered on the new completion date in the manner provided in the principal agreement, "the purchaser shall be at liberty to make a claim for the LAD as if this extension of time was not granted." (cl. 2.5)

[11] That the respondents executed the settlement agreement and that their property was subsequently delivered within time, were not matters in dispute. On the evidence, it appeared that more than 80% of purchasers affected in Phase 3B executed the settlement agreement by 20 December 2010. See p. 408 of the appeal record, vol. 2(3), which contains the project update figures as at 20 December 2010. The respondents executed the settlement agreement on 28 July 2010, as evidenced on the signature page appearing at p. 474 of the same volume of the appeal record.

[12] We noted that the purchasers of Phase 3B individually executed the settlement agreements on different dates. Hence, on p. 470 of the same volume of the appeal record, we found purchaser No. 17 executed the settlement agreement on 30 September 2011. There was justification therefore why the settlement agreement was formally dated as at 11 October 2011.

[13] As far as the present respondents were concerned, delivery of vacant possession of their property was on 9 January 2012, which was therefore within the 12 months from the date of the settlement agreement, as defined in s. 7 of the Schedule therein.

The Claim Before The Tribunal Tuntutan Pembeli Rumah

[14] Nevertheless, the respondents brought a claim before the Tribunal Tuntutan Pembeli Rumah in July 2012, claiming for LAD for late delivery of 1335 days calculated from 17 April 2008, which was the original date for

delivery of vacant possession under the SPA. The tribunal decided in their favour and awarded a sum of RM50,000 as damages for the late delivery claimed with interest at 8% on the amount if unpaid by 8 October 2012. The award of the tribunal appears on pp. 480 to 481 of the appeal record, vol. 2(3).

The Pleadings In The High Court

[15] The appellant then instituted the present claim in court against the respondents based on the tort of deceit and for breach of the settlement agreement. In the alternative, the appellant claimed for "misrepresentation, fraudulent or otherwise." See para. 19 of the statement of claim appearing on p. 36, appeal record, vol. 1 (Part A).

[16] The appellant pleaded that it was induced by the respondents to enter into the settlement agreement, to complete the construction of the property and to deliver vacant possession of the property to the respondents, by several representations made by the respondents. The appellant averred that the respondents knew and understood that the appellant would be able to utilise its financial resources to revive the housing project only if the purchasers did not pursue the claim for LAD for late delivery under the SPA. By entering into the settlement agreement and subsequently instituting a claim for LAD before the tribunal as well, the appellant argued that on this basis the representations were fraudulently made or were made with knowledge that they were false and untrue, or made recklessly without caring whether they were true or false. Paragraphs 23 to 25 of the statement of claim contained the gist of the appellant's claim for deceit and/or fraudulently misrepresentation:

> 23. Acting on the face and truth of the said presentations and induced thereby, the plaintiff entered into the said Settlement Agreement and thereafter completed the construction of the said property and delivered vacant possession to the defendants.
>
> 24. The plaintiff has since discovered that each of the said representation was untrue in that:
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> 24.1 The defendants had filed a claim at the said Tribunal on 16.7.2012 for the recovery of the LAD as calculated from 17.4.2008 which is a date for the delivery of vacant possession as stipulated under the said SPA;
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> 24.2 The said Tribunal on 7.9.2012 awarded the defendants the payment of LAD in the sum of RM50,000.00; and
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> 24.3 The defendants (in particular the 1st defendant as a member of the committee of homebuyers representing Phase 3B) induced or influenced or encouraged other homebuyers to similarly file a claim at said Tribunal for the recovery of the LAD.

25. The defendants made the said representations fraudulently and either well knowing that they were false and untrue or recklessly not caring whether they were true or false.

[17] The appellant also averred that 44 other purchasers were led to cancel their purchase in July 2012 after the respondents filed their claim with the tribunal. In para. 17 of the statement of claim, the appellant pleaded:

The plaintiff had suffered embarrassment, humiliation and loss of reputation in having to refund the other purchasers of houses in the housing project of Bandar Jaya Putra who chose to cancel the purchase subsequent to the filing of the LAD claim by the defendants.

The Particulars Of Damages Claimed

[18] The appellant therefore claimed resultant loss and damage and provided the following particulars of damages:

PARTICULARS

The award of the said Tribunal dated 7.9.2012	RM50,000.00
Loss of profits due to the cancellation of SPA by the other purchasers (and still continuing)	RM6,544,811.00
Loss of reputation for social undermining	RM10,000,000.00

The High Court Judgment

[19] The High Court dismissed the appellant's claim after a full trial. Two issues were addressed by the learned High Court Judge, namely (a) whether the respondents were liable for the tort of deceit, and (b) whether the respondents were liable to the appellant for breach of the terms of the settlement agreement. In dismissing the claim for deceit, the court found that there was no evidence that the respondents had agreed to waive the LAD, the waiver being merely a suggestion made by the respondents and the other purchasers. There was also no evidence, according to His Lordship, to establish that the respondents had, by filing their claim at the tribunal, influenced the other purchasers.

[20] As for the claim for breach of the terms of the settlement agreement, the court found the settlement agreement to be invalid on the basis that it contravened the provisions of the Housing Development (Control and Licensing) Act 1966, and further, the SPA had remained valid and not rescinded by the settlement agreement.

[21] The learned High Court Judge concluded thus in relation to the first issue:

Bagi isu (1) saya mendapati bahawa tidak terdapat sebarang keterangan bahawa defendan-defendan pernah menyatakan bahawa mereka ingin gugurkan Tuntutan LAD tersebut. Penipuan (fraud) mesti dibuktikan melangkaui keraguan munasabah (beyond reasonable doubt) tetapi dalam kes ini plaintif sama sekali gagal membuktikannya. Tidak ada keterangan

A sedemikian dikemukakan oleh plaintif. Malahan keterangan saksi plaintif sendiri iaitu SP2 dan SP3 membuktikan bahawa defendan pertama memang berhasrat untuk membuat Tuntutan di Tribunal. Atas keterangan yang ada dan kebarangkalian kes saya mendapati sebenarnya pengguguran Tuntutan LAD itu hanyalah cadangan sahaja dan bukan satu persetujuan atau janji di pihak pembeli-pembeli.

B

Plaintif mendakwa defendan-defendan telah mempengaruhi Pembeli supaya membawa Tuntutan mereka ke Tribunal Pembeli Rumah. Walau bagaimanapun tiada keterangan dikemukakan oleh plaintif untuk menyokong dakwaan ini. Dakwaan ini adalah satu perkara mustahil kerana daripada 1500 orang Pembeli Rumah, hanya 25 yang berbuat
C demikian. Terlalu sedikit jumlahnya untuk membuktikan pengaruh defendan-defendan. Lagipun pembeli-pembeli ini kesemuanya adalah ibu-ibu dan bapa-bapa yang sudah dewasa. Saya tidak fikir mereka tidak boleh membuat keputusan sendiri dalam perkara ini.

[22] As regards the second issue on the invalidity of the settlement
D agreement, the learned High Court Judge concluded that it was an attempt to evade the provisions of the Housing Development (Control and Licensing) Act 1966 and the Rules thereunder. The effect of the settlement was a contracting out of the law which provided the right to house buyers to claim for LAD for late delivery, even though a consideration of RM1 was paid.
E The court dismissed the argument that the settlement agreement was a collateral contract which could exist side-by-side with the SPA. The court drew on the decisions in *MK Retnam Holdings Sdn Bhd v. Bhagat Singh Surian Singh* [1985] 1 CLJ 520; [1985] CLJ (Rep) 199; [1985] 2 MLJ 212, and *Sentul Raya Sdn Bhd v. Hariram Jayaram & Ors and Other Appeals* [2008] 4 CLJ 618. The relevant part of the judgment reads:

F

Saya tidak bersetuju dengan hujahan Peguam plaintif bahawa perjanjian penyelesaian dalam kes ini hanya merupakan satu perjanjian kolateral yang wujud "side by side" kepada Perjanjian Jual Beli. Apa yang jelas ialah Perjanjian Jual Beli dalam kes ini tertakluk kepada 'Housing Development (Control and Licensing) Act 1966 dan juga peraturan yang
G dibuat di bawah Akta tersebut. Kes yang berkaitan ialah *Sentul Jaya Sdn Bhd v. Hariram Jayaram & Ors and Other Appeals* …

Our Evaluation On The Appeal

[23] In our view, the substance of the appeal turned on the validity of the
H settlement agreement. It seemed to us obvious on the evidence that the respondents (especially the first respondent) had expressly agreed to waive the LAD claimable under the SPA. It could not be said this waiver was a mere suggestion. Why would the respondents execute the settlement agreement except to agree to waive the earlier LAD and to accept the new completion date? In our view, the learned High Court Judge had materially
I erred in his assessment of the evidence and had failed to address the course of negotiations and meetings between the developer, the house buyers and the JPN in the context of the development being a "projek sakit" which was unfortunately delayed by *force majeure*. The developer made it plain it could

not continue with the project unless the LAD claims were waived in view of its financial difficulties resulting from the *force majeure*. The larger majority of house buyers, including the respondents, agreed to a waiver, had their houses completed and delivered by the appellant as developer/vendor within the new completion date as agreed under the settlement agreement. Despite agreeing to the waiver, the respondents still proceeded to file a claim with the tribunal and obtained the award of RM50,000 in their favour for LAD calculated from the initial period of delay under the SPA. This action constituted a clear breach of the settlement agreement on the facts.

[24] On the law, the signing of the settlement agreement would fall within the terms of s. 64 of the Contracts Act 1950 which deals with the "dispensation" of a promise made to a promisee:

> 64. Promisee may dispense with or remit performance of promise.
>
> Every promise may dispense with or remit, wholly or in part, the performance of the promise made to him, or may extend the time for such performance, or may accept instead of it any satisfaction which he thinks fit.

[25] The appellant's claim could only be defeated if the settlement agreement was illegal and flouted s. 24 of the Contracts Act 1950, as either an agreement forbidden by law, or of such a nature as would defeat any law, or would be opposed to public policy. In this appeal, the respondents took a firm view on the effect of the Housing Development (Control and Licensing) Act 1966 and reg. 11(1) of the Housing Development (Control and Licensing) Regulations 1989, in effect arguing that the LAD provision in the Schedule G standard form SPA could not be contracted out. The written submission was expressed thus:

> Isu mengenai LAD adalah "contractual" dan "statutory". Tidak ada proviso dalam kontrak atau regulasi untuk dikecualikan daripada liability dengan menggunakan alasan kepentingan awam.

[26] As a general statement of the position of the law in the context of housing development legislation which exists to protect the interests of purchasers of housing accommodation and the public at large, the proposition could be agreed. The two decisions of our courts, referred to and applied by the High Court, remain good and binding authority under our law. *MK Retnam Holdings Sdn Bhd v. Bhagat Singh Surian Singh*, *supra*, in particular, is a Supreme Court decision of considerable weight, and on the particular facts of that case, the Supreme Court had good ground to invalidate a second agreement entered into which extended the time for completion for an additional six months from the date of that agreement at an increased purchase price. The Supreme Court noted with some dismay that "[the] position of Bhagat Singh s/o Surian Singh when he signed the second agreement must be one of extreme desperation because by that time he had already retired from service and was renting a house and there had been a delay of more than a year from the due date of delivery of vacant possession

under the first agreement". The Supreme Court also observed that "the Managing Director of the developer company admitted frankly that the real reason for the second agreement was to delay the date of delivery of the house and also to get an increase in the purchase price" and had "said candidly that he was 'not aware of any other reason'". One can therefore understand why the Supreme Court held:

> ... it would seem to us that the validity of the second Agreement should be tested in the light of the Housing Developers (Control and Licensing) Rules 1970. We are of the view that the second Agreement is a clear example of "contracting out" of the provisions of the 1970 Rules. The primary object of that legislation is to protect the weak against the strong.

[27] In a similar fashion, the views expressed by the Court of Appeal in *Sentul Raya Sdn Bhd v. Hariram Jayaram & Ors and Other Appeals*, *supra*, are also reflective of the policy of the law here to "protect the weak against the strong", again on its particular and peculiar facts. We indorse and accept the views expressed by the Court of Appeal, which was highlighted in the submissions before us. To quote the relevant passage and the reference to Schedule H contract being a "special contract":

> The contact which has fallen for construction in the present case is a special contract. It is prescribed and regulated by statute. While parties in normal cases of contract have freedom to make provisions between themselves, a housing developer does not enjoy such freedom. Hence, parties to a contract in Form H cannot contract out of the scheduled form. Terms more onerous to a purchaser may not be imposed. So too, terms imposing additional obligations on the part of the purchaser may not be included in the statutory form of contract ... (at p. 626 of the Report, per Gopal Sri Ram JCA (as he then was))

[28] This was an appeal concerning, among other things, the issue whether a purchaser would be required to give notice under s. 56(3) of the Contracts Act 1950 when he or she chose to accept the delivery of vacant possession outside of the time for delivery and proceed further to sue for LAD under the standard form contract under the Housing Development (Control and Licensing) Regulations 1989. It was argued that once the date for delivery of vacant possession had passed, time became at large such that by s. 56(3) of the Contracts Act 1950, the purchaser had to give notice to render time to be of the essence once more. The Court of Appeal found this argument to be without merit. Section 56(3) dealt with general contracts, not a special contract under the housing legislation. The Court of Appeal stated:

> It follows that the requirement of notice under s. 56(3), which is an additional obligation to the detriment of the purchaser cannot be imposed on the respondents here in light of the statutory scheme under the Act. This is evident in the language of Cl. 22(2). On its proper construction, the clause makes a housing developer immediately liable to a purchaser in liquidated damages once the date for completion passes ... (at p. 626 of the Report)

[29] It was also argued in that appeal that the financial crisis of 1997 frustrated the contract, and as such the developer should be excused from further performance, since performance had become commercially impossible. The following passage in the Court of Appeal judgment is of interest, and relevant to this instant appeal:

> ... we are of the view that the defence of frustration is not available to the appellant. The 1997 financial crisis merely made it more onerous or perhaps more expensive for the appellant to perform its obligations. It did not render the contract radically different. *There is a further reason why the plea of frustration should fail. Under reg. 11(3) of the Regulations it was open for the appellant to make representations to the Controller of Housing – to quote from the Regulations – "owing to special circumstances or hardship or necessity compliance with any of the provisions in the contract of sale is impracticable* or unnecessary" ... (at p. 628 of the Report; emphasis added).

[30] On a proper reading of this decision, we do not believe the Court of Appeal was totally excluding any question of waiver of LAD, especially conditional waiver. The Court of Appeal broached the possibility of compliance with a provision being excused by making a proper representation to the authorities. On the facts of this present appeal, this was exactly what transpired. The JPN was brought into the picture and kept fully appraised of the status of the housing project and the proposal of a settlement agreement to move the development forward to completion with a new completion date and a new date for calculating LAD. In the end, the property was completed and delivered to the respondents within the extended time. The developer also waived late payment interest. We have earlier alluded to cl. 2.5 which provided that in the event vacant possession was not delivered on "the new completion date in the manner provided in the principal agreement", "the purchaser shall be at liberty to make a claim for the LAD as if this extension of time was not granted." Thus, even in the settlement agreement there was no total contracting out of the LAD provision in the SPA. If delivery of vacant possession had not been delivered by the new completion date, the respondents would have been at liberty to sue on the basis of the original LAD provision. We therefore found that on the peculiar facts of this appeal, there was no full contracting out and no situation where the purpose of the housing legislation being "to protect the weak against the strong" was ousted. In terms of policy, there should be nothing illegal in law for a Settlement Agreement to be negotiated with the full participation and direction from JPN with a view to save a failing housing project from being an abandoned project. It will be in the public interest, and in the interest of house buyers, if the law allowed a regulated settlement and waiver of LAD on terms as specified in the settlement agreement which was the subject matter of this appeal. It was therefore not right and proper for the respondents, despite their promise to conditionally waive LAD under the SPA, to resile from their promise and sue for late delivery under the SPA as if the settlement agreement did not exist.

[31] We therefore allowed the appeal in part on this basis alone. The appeal was allowed in part because we were not persuaded that the appellant had established its claim for deceit and fraudulent misrepresentation, and there was accordingly no basis legally and evidentially for the extravagant claims for loss of profits and loss of reputation for "social undermining" to be allowed. It is trite that the burden of proof for deceit/fraud is high. Proof of fraud has to be on the standard of proof beyond reasonable doubt even in civil cases. The law on this is presently clear (*Asean Security Paper Mills Sdn Bhd v. CGU Insurance Bhd* [2007] 2 CLJ 1; *Yong Tim v. Hoo Kok Chong & Anor* [2005] 3 CLJ 229; *Saminathan v. Pappa* [1980] 1 LNS 174). We did not believe the appellant had discharged its burden of proof on this high standard, and to this extent we agreed with the High Court in its assessment in rejecting the claims for damages for loss of reputation and loss of profits.

Conclusion And Orders

[32] In the premises discussed above, we unanimously allowed the appeal in part on the basis of breach of the terms of the settlement agreement. We awarded damages in the sum of RM50,000 being the sum of the award handed down by the tribunal, to be paid by the respondents to the appellant together with judgment interest from the date of our order until full payment.

[33] We ordered that each party shall bear their own costs of this appeal. The deposit was ordered to be refunded to the appellant.